A/63/54

United Nations

Report of the Ad Hoc Committee on criminal accountability of United Nations officials and experts on mission

Second session (7-9 and 11 April 2008)

General Assembly
Official Records
Sixty-third Session
Supplement No. 54

General Assembly
Official Records
Sixty-third Session
Supplement No. 54

Report of the Ad Hoc Committee on criminal accountability of United Nations officials and experts on mission

Second session
(7-9 and 11 April 2008)

United Nations • New York, 2008

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

[15 April 2008]

Contents

Chapter		*Paragraphs*	*Page*
I.	Introduction	1–6	1
II.	Proceedings	7–13	3
III.	General comments made in plenary	14–19	4
IV.	Recommendations	20	6
Annexes			
I.	Informal summary of the discussions of the Ad Hoc Committee on the report of the Group of Legal Experts, prepared by the Chairperson		7
II.	Informal working paper on international cooperation by the Chairperson for the consideration of the Working Group, together with oral and written amendments and proposals made by delegations		15

Chapter I
Introduction

1. The second session of the Ad Hoc Committee on criminal accountability of United Nations officials and experts on mission was convened in accordance with paragraph 7 of General Assembly resolution 62/63. The Committee met at Headquarters from 7 to 9 and on 11 April 2008.

2. In accordance with paragraph 1 of General Assembly resolution 61/29, the Committee is open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency.

3. At its 3rd meeting, on 7 April 2008, the Committee elected Zainol Rahim Zainuddin (Malaysia) as Vice-Chairperson to replace Ganeson Sivagurunathan (Malaysia), who was no longer available to serve in that capacity. The Committee paid tribute to Mr. Sivagurunathan for his valuable contribution to the work of the Committee. At the same meeting, the Committee also elected Minna-Liina Lind (Estonia), as Rapporteur. In 2007 Ms. Lind had replaced Martin Roger (Estonia) as a friend of the Chairperson for purposes of the Working Group of the Sixth Committee on criminal accountability of United Nations officials and experts on mission. The Bureau was thus constituted as follows:

Chairperson:
Maria Telalian (Greece)

Vice-Chairpersons:
El Hadj Lamine (Algeria)
Ruddy Flores Monterrey (Bolivia)
Zainol Rahim Zainuddin (Malaysia)

Rapporteur:
Minna-Liina Lind (Estonia)

4. The Director of the Codification Division of the Office of Legal Affairs, Mahnoush H. Arsanjani, acted as Secretary of the Ad Hoc Committee. The Codification Division provided the substantive services for the Committee.

5. At its 3rd meeting, the Committee adopted the following agenda (A/AC.273/L.2):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Organization of work.
5. Continued consideration of the report of the Group of Legal Experts established by the Secretary-General pursuant to General Assembly resolution 59/300, in particular its legal aspects, taking into account the views of Member States and the information contained in the note by the Secretariat.
6. Adoption of the report.

6. The Committee had before it:

(a) A note by the Secretary-General transmitting the report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations (A/60/980);

(b) A note by the Secretariat on criminal accountability of United Nations officials and experts on mission (A/62/329);

(c) The report of the Committee on its previous session.[1]

Other documents were available for reference purposes.

[1] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 54* (A/62/54).

Chapter II
Proceedings

7. The Committee held two plenary meetings, on 7 and 11 April 2008.

8. At its 3rd meeting, held on 7 April 2008, the Committee adopted its work programme and decided to proceed with its discussions in the context of a working group of the whole. The Committee also held a general exchange of views, during which delegations made statements. A summary of the debate is contained in section III below.

9. The Working Group held four meetings, from 7 to 9 April 2008. It organized its work by focusing its discussions on the issues concerning international cooperation contained in the report of the Group of Legal Experts (A/60/980). In particular, discussions revolved around such general issues as: (a) facilitating investigations by the host State; (b) facilitating investigations by States other than the host State; (c) administrative investigations by the United Nations; and (d) legislative and other changes. The discussion also addresses specific issues, including such matters as: (a) timely notification and reporting mechanisms; (b) collecting and securing the integrity of evidence (testimony, material, confidentiality) and use by States of material provided by the United Nations; (c) conduct of on-site investigations (consent and conditions for consent); (d) extradition and mutual legal assistance; (e) role of the United Nations (independent and professional administrative investigation); (f) role of experts, including military lawyers and military prosecutors with knowledge of the requirements of the State's military law; (g) admissibility (of evidence in a foreign jurisdiction); (h) recognition (of administrative investigation by the United Nations); (i) due process issues; (j) transfer of criminal proceedings; and (k) transfer of prisoners.

10. Representatives of the Office of Internal Oversight Services and the Office of Legal Affairs of the Secretariat were also available to respond to questions raised by delegations in the Working Group.

11. An informal summary of the discussions of the Working Group is contained in annex I to the present report. The summary was prepared by the Chairperson for reference purposes only and not as a record of the discussions.

12. The Working Group subsequently considered an informal working paper on international cooperation, prepared by the Chairperson. The informal working paper is contained in annex II.A; oral amendments and proposals made by delegations are contained in annex II.B; and written amendments and proposals submitted by delegations are contained in annex II.C. Consideration of the informal working paper will continue in the context of a working group to be established by the Sixth Committee at its sixty-third session.

13. At its 4th meeting, on 11 April 2008, the Ad Hoc Committee adopted the report on its second session.

Chapter III
General comments made in plenary

14. During the general exchange of views, delegations reiterated their support for the zero-tolerance policy concerning criminal conduct (in particular in cases of sexual exploitation and abuse) committed by United Nations personnel and experts on mission and reaffirmed the need to ensure strict observance of the rule of law in accordance with the principles of justice and international law. It was observed that criminal offences committed by United Nations personnel caused harm not only to the victim but also to the victim's family and to the host State community. Such actions also constituted a violation of trust which could seriously damage the reputation of the United Nations and impede its effectiveness in carrying out its mandate.

15. Support was expressed for General Assembly resolution 62/63 and the Assembly's emphasis therein on States establishing, to the extent they had not already done so, jurisdiction over criminal activity committed by their nationals serving with the United Nations. It was noted that by inviting Member States to provide information on their jurisdictional competence as well as on the mechanisms put into place for following up on allegations of criminal activity, resolution 62/63 would contribute towards clarifying the nature and scope of any procedural and jurisdictional gaps. Several delegations commented on the importance of the report of the Secretary-General on the implementation of the resolution, requested by the Assembly, and called on all States to submit the necessary written contributions by the deadline of 1 July 2008. Support was also expressed for the reference in the resolution to predeployment training and awareness-raising activities. Approval was expressed for the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel, adopted by the Assembly in resolution 62/214, as well as for resolution 61/291, in which the Assembly amended the revised draft model memorandum of understanding.[2]

16. Commenting on the legal and policy aspects of international cooperation among States, and between States and the United Nations, highlighted in the report of the Group of Legal Experts, support was expressed for the proposal that States should expand their cooperation on the exchange of information, extradition, the serving of sentences and on other measures to facilitate the effective exercise of criminal jurisdiction, including judicial assistance mechanisms. Similarly, cooperation with the United Nations could cover the exchange of information, assistance with respect to procedural issues (such as the gathering of evidence), reporting on the current status of investigations and enhancing the rule of law capacities. It was also suggested that existing conventional instruments could be of relevance and that consideration could be given to the model status-of-forces agreement and the model status-of-mission agreement, which included a number of provisions on cooperation. Reference was also made to the fact that while criminal investigation remained the primary responsibility of the host State, evidence gathered by the United Nations nonetheless remained important for subsequent criminal proceedings. It was noted that there might be, in addition to the host State

[2] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 19* (A/61/19).

and the State of nationality of the perpetrator, other States which may have an interest in possible criminal investigations.

17. Some delegations were of the view that the procedures for the collection of evidence by the Office of Internal Oversight Services were too irregular to be admissible in criminal proceedings. It was also observed that some States maintained restrictions on the authorities who were competent to gather evidence. It was further pointed out that consideration had to be given to the fact that countries varied in terms of stage of institutional development and it was suggested that efforts could be undertaken to bolster the capacity of host States by providing, upon their request, assistance to them in conducting investigations.

18. Some delegations reiterated the view that it was premature to discuss the possibility of negotiating an international convention on the topic, as had been proposed by the Group of Legal Experts, and as had been subsequently supported by the Secretariat in its note. It was argued that it was necessary to understand the actual impediments to prosecution, before embarking on the negotiation of a convention. Some delegations expressed support, in principle, for a convention requiring Member States to exercise jurisdiction over their nationals participating in United Nations operations. It was noted that while bilateral agreements existed in the area, they provided incomplete coverage and did not usually address judicial cooperation between States and the United Nations. Other recommendations included developing a protocol of cooperation between States and the Office of Internal Oversight Services. A suggestion was also made for an agreed set of terminology.

19. It was pointed out that other issues, such as the scope *ratione personae*, the definition of crimes involved and issues relating to jurisdiction, merited further consideration. A preference was expressed for not limiting the topic to personnel involved in peacekeeping operations, while excluding members of national contingents and military observers. Several delegations expressed support for including all crimes within the scope of the topic, not only those involving sexual exploitation and abuse. It was further recommended that efforts should be made to coordinate with the Special Committee on Peacekeeping Operations, as well as with the Fifth Committee, to avoid duplication and divergent outcomes.

Chapter IV
Recommendation

20. At the 4th meeting, on 11 April 2008, the Ad Hoc Committee, bearing in mind paragraph 7 of resolution 62/63, reiterated the recommendation that the Sixth Committee during the sixty-third session of the General Assembly, establish a working group with a view to continuing the consideration of the report of the Group of Legal Experts (A/60/980) established by the Secretary-General pursuant to resolution 59/300 focusing on its legal aspects, also taking into account the views expressed in the Ad Hoc Committee.

Annex I

Informal summary of the discussions of the Ad Hoc Committee on the report of the Group of Legal Experts, prepared by the Chairperson

A. Informal summary of discussions at the first and second meetings of the Working Group

Aspects relating to cooperation

1. At its first meeting, on 7 April 2008, the Working Group proceeded to the discussion of issues concerning international cooperation on the basis of the general and specific issues identified in paragraph 9 of the main part of the present report, above.

2. Delegations were of the view that cooperation in criminal proceedings brought against United Nations officials and experts on mission was crucial, with some delegations highlighting the legislative and other arrangements available in their jurisdictions to facilitate such cooperation. It was suggested that consular and diplomatic missions in the host State could play an important role in the realization of such cooperation, in particular with respect to communication between the United Nations and Member States. While the need to respect State sovereignty was emphasized, attention was drawn to the existing legal instruments relating, inter alia, to human rights guarantees and to the protection of the victims. Reference was also made to the mandates conferred by the Security Council, which included aspects relating to the rule of law.

3. It was observed by some delegations that cooperation by means of ad hoc arrangements entailed certain problems. In particular, it was noted that cooperation in criminal proceedings normally required the existence of a legal basis such as a treaty. It was also observed that the conclusion of an ad hoc arrangement might require a certain period of time and that delays occasioned thereby might jeopardize the integrity of the evidence. The view was expressed that some of those problems might be resolved by the adoption of a multilateral convention. It was also suggested that a convention could be useful for enhancing cooperation between Member States and the United Nations. The point was made that such a convention could be elaborated on the basis of the key provisions of General Assembly resolution 62/63, including the obligation of the Secretary-General to inform the State of nationality of the official or expert on mission of his or her alleged criminal misconduct.

4. The need for timely notification of allegations to the Office of Internal Oversight Services (OIOS) and the relevant national authorities was emphasized by some delegations. The point was made that allegations of misconduct that might constitute a crime should be notified simultaneously to OIOS and to the authorities of the host State. The issue was also raised regarding the need to open clear channels through which a host State that believes that a United Nations official or expert on mission has committed a crime could interact with the Secretariat to obtain relevant information. It was stated that the United Nations had an important responsibility of informing victims of the various channels — both within the United Nations system and before national authorities — available to them for

reporting allegations of criminal conduct by United Nations officials and experts on mission. The importance of creating a safe environment for the victims was emphasized, and reference was made in this context to the comprehensive strategy on assistance and support to victims of sexual exploitation and abuse by United Nations staff and related personnel, of December 2007. Furthermore, attention was drawn to the problems that might arise in assessing the credibility of an allegation.

5. The importance of having independent and professional investigations, in particular by the United Nations, was underscored. Delegations were of the view that cooperation in the conduct of investigations was essential, in particular in order to secure the evidence and to preserve its integrity. Some delegations stressed the importance of finding ways and means to assist the host State in the conduct of criminal investigations and to ensure, as appropriate, the right of other States to have access to the *locus delicti* for investigatory purposes. According to one point of view, priority should be given to the host State for conducting criminal investigations, although the State of nationality should be kept informed of the proceedings. According to another view, while the host State had an important role to play in collecting the evidence, priority should be given to the jurisdiction of the State of nationality of the alleged offender in view of the international status of the individuals involved and of the need to preserve their due process rights. It was emphasized that on-site investigations by other States were subject to the consent of the host State.

6. The need to enhance the capacity of OIOS to conduct administrative investigations was underlined by several delegations. The need for coordination and uniformity within the United Nations in the conduct of investigations was also stressed. Several delegations were of the view that some of the evidence gathered by the United Nations as a result of an administrative investigation might be relevant in future criminal proceedings; there was therefore a need to develop procedures, including, as appropriate, through legislative changes, that would facilitate the use of such evidence in criminal proceedings. However, it was also observed that criminal and administrative investigations were different in nature, in particular as regards the methods used and the requirements concerning the burden of proof. Reference was made to the legal obstacles that States may encounter as regards the use in criminal proceedings of evidence collected by the United Nations. It was proposed that a recommendation be made to the effect that OIOS should contact as quickly as possible the State of nationality of the alleged offender as well as, when necessary, the host State, in order for the State concerned to commence appropriate criminal investigations. In this context, a parallel was drawn to the recent amendments introduced to the model memorandum of understanding as regards investigations in respect of crimes allegedly committed by members of national contingents in peacekeeping operations. The issue of confidentiality of information detained by the United Nations was raised, as well as the necessity of guaranteeing due process rights.

7. While it was observed that a discussion on extradition would be premature, since it was closely linked to the question of jurisdiction, the elaboration of a model clause to be included in extradition treaties was also suggested.

8. Support was expressed for the use of various categories of experts, which should not be limited to military lawyers but should include all available actors, including lawyers from the private sector as well as bar associations and

representatives of civil society. It was proposed that focal points be established in order to allow victims to contact relevant experts.

Other aspects

9. Some delegations expressed support for covering a wide-scope *ratione personae* and *ratione materiae*. The view was expressed that the latter should include not only crimes related to sexual exploitation and abuse, but also crimes against the life, security or integrity of the person, as well as other crimes such as corruption and embezzlement, as well as traffic offences. The precise definition of the crimes, as well as the punishment that they entailed, could be addressed in extradition treaties.

10. It was reiterated that the situation of a United Nations official or expert on mission who committed a crime outside the territory of the host State should also be addressed.

B. Question-and-answer segment

11. During the discussions in the Working Group, several delegations expressed the wish for more information from the Secretariat, in particular in order to assist in assessing the existence or the extent of the jurisdictional gaps identified by the Group of Legal Experts, as well as the need for a convention to fill those potential gaps. In particular, information was requested on a number of issues, including (a) the challenges and difficulties encountered in dealing with allegations of criminal conduct committed by United Nations officials or experts on mission; (b) an update on developments that had occurred since the issuance of the report of the Group of Legal Experts; (c) the present capacity of OIOS to conduct administrative investigations, including the preservation of evidence; (d) the location in which investigations were carried out and the probable timelines for the conduct of such investigations at the *locus delicti*; (e) the transfer of cases to national jurisdictions, in particular with regard to which jurisdiction was usually contacted by the United Nations; (f) the nature of the existing interaction between the United Nations and Member States; (g) whether ad hoc arrangements had proved satisfactory in establishing cooperation in criminal matters involving allegations of crimes committed by United Nations officials and experts on mission; (h) issues relating to obtaining the consent of the host State in order to carry out on-site investigations; (i) disciplinary sanctions imposed on United Nations staff members who committed serious misconduct that could amount to a criminal offence; and (j) issues relating to the waiver of immunity and, in particular, the challenges related to capacity-building once immunity was waived. Accordingly, at the second meeting of the working group, on 8 April 2008, delegations had an opportunity to interact with representatives of OIOS and the Office of Legal Affairs, and to ask questions.

12. The representative of OIOS noted that its activities were determined by elements of mandate, functionality and capacity. OIOS essentially had powers to investigate possible misconduct of staff of the Organization, as well as possible misconduct by personnel of a national contingent of a troop-contributing country in cases concerning sexual exploitation and abuse. It did not have a mandate to conduct criminal investigations.

13. Since OIOS had no competence in intelligence-gathering, its investigations were based on information received from a variety of sources (individuals, civil society and the media, as well as leads during regular audits). Operationally, OIOS was not the primary point of contact: the Conduct and Discipline Unit of the Department of Field Support was the first to receive a complaint in peacekeeping operations and special political missions where it had a presence. However, once OIOS received a complaint, it dealt with the matter with utmost priority, taking into account the seriousness of the allegations. Information received was typically analysed to make a preliminary assessment as to whether the matter at issue fell within the mandate of OIOS. While the relationship with staff was based on a specific mandate, the relationship with troop-contributing countries was strictly collaborative, and it was a collaborative function that had been readily accepted by such countries.

14. There was an outreach programme to facilitate reporting, particularly in respect of sexual exploitation and abuse complaints. For example, the Conduct and Discipline Unit and the Office of the United Nations High Commissioner for Refugees (UNHCR) provided such outreach services in field missions and in refugee camps. There were also awareness programmes for the United Nations community regarding investigations.

15. Services rendered by OIOS were confidential, anonymous and inviolable. Provision was also made for dealing with possible retaliation, and attention was drawn to the role of the Ethics Office concerning questions of disclosure and whistle-blowing.

16. There was no witness protection programme as such. However, within some agencies, such as UNHCR, programmes were available for expedited relocation for refugees at risk, and there were also possibilities for staff to be reassigned to other responsibilities. Security issues were dealt with by the security services of the Organization in cooperation with local authorities.

17. In view of its mandate, OIOS did not use standards of criminal law to characterize investigations of misconduct falling within its competence. However, generally, any form of criminal conduct would also constitute misconduct for purposes of administrative action.

18. Although the standards used were not those for criminal investigations, best-practices standard techniques were employed for collecting evidence, such as ensuring chain of custody, consideration of forensic issues, disk imaging for internal use in disciplinary action and DNA sampling for paternity. While the techniques employed might indeed be consistent with techniques of national authorities, given that OIOS was not an agent of a national authority (with sovereign authority), questions regarding the veracity of evidence, its admissibility, the standard of proof and conclusiveness could arise in the jurisdiction in which the information generated was to be used. However, such constraints did not pose particular problems for OIOS in the execution of its mandate in investigations to support a potential internal disciplinary action.

19. OIOS was not in a position to evaluate whether a violation of local law had taken place other than in the context of executing an administrative investigation. It did not have a mandate to make such an evaluative criminal assessment, which would also be impractical.

20. OIOS was currently undergoing reforms that were the subject of consideration by relevant legislative bodies. The report of the Group of Legal Experts was one among several reports considered by OIOS in designing its current reform proposals.[a] Any envisaged role of OIOS in conducting criminal investigations would require a mandate change.

21. OIOS was also updating its standard operating procedures. The updated procedures were expected to be launched on 1 July 2008, to coincide with the effective date of the anticipated OIOS reforms. The Manual of Investigation Practices and Procedures had new investigative protocols and an integrated learning programme to facilitate on-site training. The Manual was a matter of public record; the standard operating procedures were not confidential but would not be made public.

22. Statements relating to investigations were not made under oath. Changes had been introduced for recording testimony, now in the form of a question-and-answer deposition signed by the staff member. For staff members, the duty to cooperate, tell the truth and maintain confidentiality, as well as the possible consequences of a failure to make an accurate and truthful statement, provided guarantees of adequate cooperation with an investigation. Staff members risked summary dismissal or suspension.

23. OIOS made efforts to issue a report concerning an investigation before a staff member was separated from the Organization. Such a report became part and parcel of the personal file of an individual and could bear on future employment prospects within the Organization or its funds and programmes.

24. When an administrative investigation revealed the possibility that a crime might have been committed, OIOS provided the necessary information to management for decision-making. Additional care was taken to meet higher standards operationally. OIOS would make recommendations that were appropriate in accordance with its role in carrying out an administrative investigation for purposes of internal disciplinary action. Local criminal law could be used to evaluate whether a criminal offence might have been committed without making a determination of which jurisdiction would be appropriate for the consideration of a particular matter.

25. Particularly in circumstances where a violent crime was involved, the Office of Legal Affairs would serve as the first point of contact to ensure consistency and compatibility with the obligations under the 1946 Convention on the Privileges and Immunities of the United Nations.

26. In carrying out its functions, OIOS also collaborated operationally with local law enforcement, which usually had a significant head start in conducting an investigation concerning particular conduct. This role was distinct from law enforcement but complementary. Following prior consultations with the Office of Legal Affairs, OIOS might act as a point of reference for contact with local law enforcement in matters relating to the operational aspects of an investigation.

27. The regular annual reports of OIOS to the General Assembly provided updates on statistical data.

---

[a] See A/62/582 and Corr.1.

28. The representatives of the Office of Legal Affairs stated that the Office provided central legal services to the Organization and its funds and programmes. Ordinarily, official requests from Member States for further information or requests for access to witnesses were transmitted through the Permanent Missions. Issues of confidentiality were duly taken into account by the Organization in making a determination on a request for information. Once a decision was made by the Office of the Secretary-General, it was likewise transmitted through Permanent Missions.

29. In matters concerning outside investigations of a criminal nature involving the Organization or its staff, the Office of the Secretary-General consulted with the relevant substantive department and the Office of Legal Affairs. The Office of Legal Affairs proffered advice on the relevancy of jurisdiction, which was primarily that of the State in which the crime had been committed. In view of the provisions of resolution 62/63, there would be an established process for notification to the State of nationality.

30. In practice, the Organization, instead of invoking provisions for the waiver of immunity at the outset, elected to cooperate voluntarily in relation to an investigation. Documents were provided on a voluntary basis without prejudice to the possible invocation of immunity.

31. The transfer of a case to a national jurisdiction for purposes of criminal proceedings was considered on a case-by-case basis in the context of the 1946 Convention. Situations of waiver at the earlier stages of an investigation tended to arise often when the staff member was required as a witness in criminal proceedings. In making determinations on waiver, the main considerations revolved around safeguarding the interests of the Organization and the impact of waiver or lack thereof in the administration of justice. Once immunity had been waived, the Secretariat was generally not provided information regarding difficulties, including evidentiary issues, that might arise in criminal proceedings instituted before national jurisdictions. Except in situations in which the Organization had an executive mandate to assist national judicial institutions, it had no legal capacity to provide support to State authorities in the exercise of criminal jurisdiction.

32. When an individual separated from Organization, the immunity *ratione materiae* continued to subsist and could be invoked by the Organization.

33. Not many problems were encountered in terms of cooperation with national authorities, although sometimes it was difficult to comply with the judicial calendar of a local jurisdiction because of the need to facilitate access to counsel. The retention of counsel might require compliance with United Nations procurement rules, a process that might take longer to complete. Such delays, however, had not been detrimental to the final outcome of the proceedings.

34. As there was no right to counsel for staff members, the provision of counsel by the Organization was discretionary and decided on a case-by-case basis. Often counsel was not needed since most of the waiver requests related to giving testimony (authentication of documents and providing background information) in cases that did not directly involve the Organization or its officials. Attention was also drawn to the administrative instruction on the reporting of arrest or detention of staff members or other agents of the United Nations and members of their families (ST/AI/299).

35. Under the Staff Regulations and Rules, staff members were amenable to administrative and disciplinary action for misconduct. This could include summary dismissal or a written censure. Unlike staff members, experts on mission were not subject to Staff Regulations and Rules; accordingly, they were not easily amenable to administrative sanction.

C. Consideration of the informal working paper on international cooperation, prepared by the Chairperson for the consideration of the Working Group

36. Following consultation with the Working Group, the Chairperson presented an informal working paper on international cooperation at the 3rd meeting of the Working Group, held on 8 April 2008. A revised version of the working paper (see annex II.A below) was subsequently circulated at the 4th meeting of the Working Group, held on 9 April 2008. It was explained that the paper, which was based on the recommendations developed by the Group of Legal Experts,[b] contained suggested general policy directions that could help advance the Working Group's work in addressing issues of international cooperation, and was not a final document, nor was it to be considered binding on States. It was further clarified that the intention was to cover all possible types of situations that could arise in practice. A preliminary discussion of the two versions of the informal working paper was held at the 3rd and 4th meetings of the Working Group. A delegation noted that the various provisions reflected the basic ideas set out in General Assembly resolution 62/63. It was also pointed out that the General Assembly, on the recommendation of the Fifth Committee, had adopted resolution 62/247, paragraph 19 of which was related to the work of the Ad Hoc Committee; the report of the Secretary-General requested under that paragraph could be taken into account by the Sixth Committee in its work.

37. Some delegations noted that the informal paper contained elements that did not conform with existing national legislation or involved political considerations (such as issues relating to the transfer of prisoners) and, accordingly, required further reflection and discussion. It was also observed that account needed to be taken of the mandate of the Ad Hoc Committee, and that further consideration of the scope of the topic (including whether military observers serving as United Nations experts on mission were included or not) was needed in order to more fully appreciate the implications of the policy directives in the informal paper. A delegation expressed the view that the paper could have been recast in the form of a list of existing problems, as opposed to suggestions. It was further pointed out by some delegations that the reference in several paragraphs to there being "a need" for States to act did not seem borne out by the discussions in the Ad Hoc Committee, including by the presentations of the Secretariat. It was recommended that further information be provided as to the necessity of States acting on the measures contemplated in the informal working paper.

38. Several delegations expressed support for a refinement in the revised version of the informal paper so as to include more explicit reference to cooperation between States and the United Nations. It was also suggested that more specific

[b] See A/60/980.

reference be made to national legislation. A delegation noted that part of the difficulty was that the Secretariat did not currently share information about possible criminal actions of United Nations officials or experts on mission with the host State or State of nationality as soon as it became aware of such conduct. Accordingly, in cases of suspected criminal conduct, the emphasis should be placed less on internal administrative investigations and more on sharing information with States with a view to undertaking a criminal investigation and prosecution, if applicable. It was further suggested that greater reference could be made, throughout various paragraphs, to the rights of individuals in criminal proceedings, including in the context of the transfer of prisoners and the serving of sentences.

39. Several delegations requested more time to reflect on the provisions of the informal paper and to consult their capitals.

Annex II

Informal working paper on international cooperation prepared by the Chairperson for the consideration of the Working Group, together with oral and written amendments and proposals made by delegations

A. Informal working paper on international cooperation prepared by the Chairperson for the consideration of the Working Group[a]

In view of the limited capacity of the United Nations to conduct investigations with respect to crimes of a serious nature committed by United Nations officials and experts on mission, there is a need to explore ways and means of enhancing international cooperation among States and between States and the United Nations in order to ensure accountability for such crimes. The following suggestions are made to this end:

(a) There may be need for States to consider the adoption of appropriate measures and arrangements to ensure that there are procedures available under their domestic law which would facilitate the recognition and use of evidence [Alternative: possible admissibility of information and material] obtained from the United Nations in criminal proceedings initiated in their territory for the prosecution of crimes of a serious nature committed by United Nations officials and experts on mission;

(b) When the United Nations receives information on misconduct that also reveals that a crime of a serious nature might have been committed, it should promptly inform the appropriate United Nations unit for the purpose of disciplinary action and the States concerned for purposes of criminal proceedings;

(c) There is a need for States to cooperate with one another in taking measures as may be necessary under their domestic law to investigate the facts contained in information received that a United Nations official or expert on mission may have committed a crime of a serious nature and to promptly inform other interested States and the Secretary-General of the United Nations of their findings and as to whether they intend to exercise jurisdiction, bearing in mind due process requirements and considerations of confidentiality;

[Alternative: When States are investigating facts suggesting that a United Nations official or expert on mission may have committed a crime of a serious nature, they should promptly inform other interested States and the Secretary-General of the United Nations of their findings and as to whether they intend to exercise jurisdiction, bearing in mind due process requirements and considerations of confidentiality.]

(d) There may be need for States to consider affording one another the greatest measure of assistance in connection with investigations and criminal or extradition proceedings in respect of a crime of a serious nature committed by a United Nations official or expert on mission, including assistance in obtaining evidence at their disposal that is necessary for the conduct of the proceedings. Such

[a] Revised version considered by the Working Group at its 4th meeting, held on 9 April 2008.

assistance shall be in accordance with any treaties or other arrangements on mutual legal assistance that may exist between them or in accordance with their domestic law;

(e) There may be need for States to consider the possibility of transferring to another State criminal proceedings for the purpose of prosecuting a United Nations official or expert on mission where the interests of justice so require;

(f) There may be need for States to consider entering into agreements or arrangements on the transfer of United Nations officials or experts on mission sentenced to imprisonment or other forms of deprivation of liberty in order that they may complete their sentences in one another's territory, taking into account the interests of justice;

(g) There may be need for States to take appropriate measures in accordance with their domestic law and within their means to provide effective protection from potential retaliation or intimidation of witnesses (as well as victims who are witnesses) who give testimony concerning crimes of a serious nature alleged to have been committed by United Nations officials and experts on mission, without prejudice to the rights of the alleged offender, including the right to due process;

(h) There may be need for States to explore ways in which the capacity of the host State can be enhanced so as to enable it to conduct an effective investigation in respect of crimes of a serious nature committed by United Nations officials and experts on mission;

(i) There may be need to ensure that the measures taken by States are not inconsistent with any immunity that the United Nations and a United Nations official or expert on mission may enjoy.

B. Oral amendments and proposals made by delegations in regard to the informal working paper proposed by the Chairperson

The following oral amendments, and proposals relating, to the informal working paper on international cooperation prepared by the Chairperson were made at the 4th meeting of the Working Group, held on 9 April 2008.[b]

Chapeau

Recast to emphasize less the limited capacity of the United Nations and more positively its existing capacity (United States of America).

In the last sentence, replace "suggestions" with "suggested considerations" (United States of America).

Paragraph (b)

Align the formulation of the paragraph with that of paragraph 9 of General Assembly resolution 62/63 (Brazil).

[b] Oral amendments and proposals subsequently submitted in writing are not reproduced in this section.

Paragraph (c)

Reformulate paragraph to closely reflect the mandate of the Ad Hoc Committee in relation to scope (Egypt).

Delete paragraph (c) (Pakistan).

Paragraph (d)

Reformulate paragraph to closely reflect the mandate of the Ad Hoc Committee in relation to scope (Egypt).

Paragraph (e)

Include refence to existing bilateral agreements on mutual legal assistance (Pakistan).

Delete paragraph (e) (Egypt).

Paragraph (f)

Include reference to existing bilateral agreements on mutual legal assistance (Pakistan).

Delete paragraph (f) (Egypt).

Paragraph (h)

Reformulate to indicate that no judgement is being made as to the host State's capacity (Egypt).

C. Written amendments and proposals submitted by delegations in regard to the informal working paper proposed by the Chairperson

1. Proposal by Australia, Canada and New Zealand

Chapeau

Replace "In view of the limited capacity of the United Nations to conduct investigations" with "In view of the challenges faced by the United Nations in investigations".

Paragraph (a) bis

Insert the following as paragraph (a) *bis*:

"When conducting investigations which may suggest that crimes of a serious nature have been committed by a United Nations official or expert on mission, there is a need for the United Nations to consider any appropriate measures that may assist the possible admissibility of information and material in criminal proceedings, and for States concerned to consider any cooperation in this regard."

Paragraph (b)

Replace "[w]hen the United Nations receives information on misconduct that also reveals that a crime of a serious nature might have been committed, it" with "[w]hen the United Nations receives credible allegations that reveal that a crime of a serious nature might have been committed by a United Nations official or expert on mission, it".

Paragraph (c)

Prefers alternative text, with "interested States" replacing "States concerned".

If the original text is retained, insert after "information received" the phrase "by the State concerned" and replace "interested States" with "States concerned".

Paragraph (g)

Replace "provide effective protection from" with "prohibit".

At the end of the paragraph, add "and facilitate access to victim assistance programmes".

2. Proposal by China

Chapeau

In the last sentence, replace the word "suggestions" with the word "considerations".

Paragraph (a)

Prefers the proposed alternative: "possible admissibility of information and material".

Paragraph (c)

Prefers the alternative text, with the replacement of "they should promptly inform other interested States and the Secretary-General of the United Nations of their findings and as to whether they intend" with "they should as soon as possible inform other States concerned and the Secretary-General of the United Nations as to whether they intend".

Paragraph (d)

Replace "[t]here may be a need for States to consider affording one another the greatest measure of assistance in connection" with "States are encouraged to cooperate with one another in connection".

Paragraphs (e) and (f)

Replace both paragraphs with the following:

"For the purpose of the interests of justice, convenient jurisdiction and better enforcement of sentences, States are encouraged to consider cooperating in transferring criminal proceedings and sentenced persons."

3. Preliminary proposal by Cuba on behalf of the Movement of Non-Aligned Countries

Chapeau

Replace with the following:

"In view of the limited capacity and mandate of the United Nations to conduct investigations with respect to crimes involving sexual exploitation and abuse and related crimes and other crimes of a serious nature committed by United Nations officials and civilian experts in peacekeeping missions, it is important to explore ways and means of enhancing international cooperation among States and between States and the United Nations in order to ensure accountability for such crimes of a serious nature. Questions concerning mandate and scope should be addressed in accordance with resolutions of the General Assembly. The following are suggested for consideration:

Paragraph (a)

Replace with the following:

"Appropriate measures and arrangements to ensure that there are procedures available under their domestic law which may encourage the possible admissibility of information and material obtained from the United Nations in criminal proceedings initiated in their territory for the prosecution of crimes of a serious nature committed by United Nations officials and experts on mission, bearing in mind due process considerations."

Paragraph (c)

Replace with the following:

"Cooperation with regard to measures as may be necessary under domestic law to investigate allegations contained in information received that United Nations officials and civilian experts in peacekeeping missions may have committed a crime of a serious nature and to promptly inform other interested States and the Secretary-General of the United Nations of their findings and as to whether they intend to exercise jurisdiction, bearing in mind due process requirements and considerations of confidentiality."

Paragraph (d)

The first sentence to be replaced by:

"Affording the greatest measure of assistance in connection with investigations, criminal or extradition proceedings in respect of a crime of a serious nature committed by United Nations officials and civilian experts in peacekeeping missions, including assistance in obtaining evidence at their disposal that is necessary for the conduct of the proceedings."

Paragraph (e)[c]

Replace with the following:

[c] Paragraphs (e) and (f) remain under consideration by the Non-Aligned Movement.

"States may consider the possibility of transferring to another State criminal proceedings for the purpose of prosecuting United Nations officials and civilian experts in peacekeeping missions where the interests of justice so require. Such transfers shall be in accordance with any treaties or other arrangements on mutual legal assistance that may exist between them or in accordance with their domestic law."

Paragraph (f)[c]

Replace "or experts on mission" with "and civilian experts in peacekeeping missions".

Paragraph (g)

Replace with the following:

"[t]ake appropriate measures to provide effective protection from potential retaliation or intimidation of witnesses (as well as victims who are witnesses) who give testimony concerning crimes of a serious nature alleged to have been committed by United Nations officials and civilian experts in peacekeeping missions, without prejudice to the rights of the alleged offender, including the right to due process."

Paragraph (h)

Replace with the following:

"Host States may request support and assistance towards capacity-building to enhance their ability to conduct effective investigations in respect of crimes of a serious nature committed by United Nations officials and civilian experts in peacekeeping missions."

Paragraph (i)

Replace with the following:

"ensure that the measures taken by States are not inconsistent with any immunity that United Nations officials and civilian experts in peacekeeping missions may enjoy."

4. Proposal by Israel

Replace the chapeau with the following:

"In view of the importance of ensuring that crimes of a serious nature committed by United Nations officials and experts on mission do not go unpunished and that the alleged perpetrators of such crimes are brought to justice, there is a need to explore ways and means to enhance international cooperation among States and between States and the United Nations in order to ensure accountability for such crimes. The following suggestions are made to this end:".

5. Proposal by Japan

Paragraph (d)

For "Such assistance shall be in accordance with" read "Such assistance should be in accordance with".

6. Proposal by Jordan

Paragraph (a)

Insert at the end of the paragraph: "bearing in mind due process considerations."

7. Proposal by Nigeria and Pakistan

Paragraph (c)

Replace the paragraph with:

"Upon investigation of allegations that a United Nations official or expert on mission may have committed a crime of a serious nature, States should as soon as possible inform other concerned States and the Secretary-General of the United Nations of their findings and as to whether they intend to exercise jurisdiction, bearing in mind due process requirements and considerations of confidentiality."

Replace "facts" with "allegations".

Paragraph (e)

Replace the paragraph with:

"States are encouraged to consider the possibility of transferring to another State criminal proceedings for the purpose of prosecuting a United Nations official or expert on mission where the interests of justice so require. Such transfers shall be in accordance with any treaties or other arrangements on mutual legal assistance that may exist between them or in accordance with their domestic law."[d]

Paragraph (f)

Replace the paragraph with:

"States are encouraged to consider entering into agreements or arrangements on the transfer of United Nations officials or experts on mission sentenced to imprisonment or other forms of deprivation of liberty in order that they may complete their sentences in one another's territory, taking into account the interests of justice. Such agreements or arrangements shall be in accordance with any treaties or other arrangements on mutual legal assistance that may exist between them or in accordance with their domestic law."

8. Proposal by the Russian Federation

Chapeau

After "limited capacity" add "and the mandate".

After "cooperation among States" add "and the Organization".

[d] Addition to take care of concerns that it is not evident that such procedure is governed by bilateral agreements and domestic law.

Paragraph (a)

Delete paragraph (a).

Paragraph (b)

Reformulate the paragraph as follows:

"When the United Nations receives information on misconduct that also reveals that a crime might have been committed, it should promptly inform the State of nationality of a United Nations official or expert on mission and the host State for purposes of criminal proceedings. The State of nationality and the host State, after having considered such information, [should] inform each other and the Secretary-General of the United Nations as to whether they intend to exercise jurisdiction and closely cooperate on matters pertaining to the criminal prosecution of an alleged perpetrator."

Insert as new paragraph (b) *bis*:

"Without prejudice to the immunities enjoyed by the United Nations and its officials and experts on mission, the Organization should cooperate at all times with the State exercising jurisdiction in order to provide it with the materials and assistance necessary for the effective administration of justice by this State."

Paragraph (c)

Replace the paragraph with the text of operative paragraph 4 of General Assembly resolution 62/63.

Paragraph (d)

Replace "There may be a need for States to consider affording one another the greatest measure" with "States are encouraged to consider affording each other possible measures".

Paragraph (e)

Replace "There may be a need for States to consider the possibility" with "States should consider the possibility".

Paragraph (f)

Replace "There may be a need for States to consider entering" with "States are encouraged to consider entering".

At the end of the paragraph, add "including the need to ensure the due process rights of the person concerned".

Paragraph (g)

Replace "There may be a need for States to take appropriate measures" with "States are encouraged to take appropriate measures".

Paragraph (h)

Add the following to the end of the paragraph:

"It is understood, though, that in some specific cases the capacity of the host State to exercise jurisdiction might be still insufficient. In such cases, criminal prosecution by the State of nationality of a United Nations official or expert on mission might better serve the interests of justice and safeguard the rights of a person under investigation."

9. Proposal by Slovenia, on behalf of the European Union

Chapeau

Replace "In view of the limited" with "Taking into account the mandate and the".

Amend the end of the first sentence to read "for such crimes, having due regard for the immunities enjoyed by the United Nations and United Nations officials and experts on mission."

Paragraph (a)

Replace the paragraph with:

"There may be a need for States to consider ensuring that procedures are available under their domestic law for the possible admissibility of information and material obtained from the United Nations in criminal proceedings initiated in their territory for the prosecution of crimes committed by United Nations officials and experts on mission".

Paragraph (b)

Replace "for purposes of criminal proceedings" with "to enable criminal proceedings".

Paragraph (c)

Replace the paragraph with:

"When States are investigating facts suggesting that a United Nations official or expert on mission may have committed a crime of a serious nature, they should promptly inform other States concerned and the Secretary-General of the United Nations of their efforts to investigate and as to whether they intend to exercise jurisdiction, bearing in mind due process requirements and considerations of confidentiality".

Paragraph (d)

Replace "[t]here may be need" with "[t]here may be a need".

Paragraph (e)

Replace "[t]here may be need" with "[t]here may be a need".

Replace "where the interests of justice so require" with "for a crime of a serious nature where such transfer is considered to be in the interest of the proper administration of justice".

Paragraph (f)

Replace "[t]here may be need" with "[t]here may be a need".

Paragraph (g)

Replace "[t]here may be need" with "[t]here may be a need".

Replace "for States to take appropriate" with "for States to consider taking appropriate".

Paragraph (h)

Replace "[t]here may be need" with "[t]here may be a need".

Paragraph (i)

Delete the paragraph (in the light of the proposed amendment to the chapeau).

08-30586 (E) 230508